



Recent Legal and Practical Issues Pertaining to TDS & TCS

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1 INTRODUCTION

Chapter XVII is a chapter which is the favourite for all Executives of the CBDT to play with. It gathers revenue based on specific transactions (the list of which is ever increasing), paid to the Government on a month to month basis, reported quarterly and summarised yearly.

While any change in any other Schedule, Chapter or Section can attract attention of the tax payers immediately, and raise a reaction on the increase or decrease in the rate involved, this Chapter is a silent killer. It casts the obligation on the person acting as a tax collector on behalf of the government, not directly on the taxpayer and puts the obligation on the agent to collect the tax and pay it to the government. Thus the reaction is slow to be realised and impact the real taxpayer is felt much later.

The increase in the responsibility on the tax deductor or collector becomes a compliance issue and therefore a compulsion which has to be ensured, else the consequences are extremely harsh and onerous.

The Mandate of the article is “Recent Legal and Practical Issues Pertaining to TDS & TCS”, however unless certain procedural aspects are clarified, the legal implications cannot be brought out, hence the same may please be read in that light.

Non Compliance or misfeasance invites:

A Charging of interest

- B Levy of penalty
- C Prosecution of Principal Officers
- D Disallowance of related expenses
- E Qualification in audit report, attracting the attention of people who are otherwise not affected.

2. TAX COLLECTION/ DEDUCTION ON CASH BASIS, ACCRUAL BASIS

2.1 Chapter XVII is known for the concept of Tax Deduction or Collection on the basis of “payment or credit to the account , of the payee, (including “Suspense account), whichever is earlier”. The exception to the use of this phrase is in the case of S. 192 TDS on Salaries and S195 TDS on Payments in respect of Foreign remittances.

2.2 It has been the accounting practice to book expenses which pertain to a particular accounting year, in that particular year only, by debiting the expense head and crediting the same, either to the creditors account, or expense payable account or to the suspense account. One aspect that tends to be overlooked is the concept of “creation or acceptance of a liability to pay to a particular vendor for a particular sum”. While finalising the accounts, the concept of debit is fully complied with but the credit to the vendor, of a particular amount can be subject matter of various criteria

and therefore the identity of the vendor or the exact amount payable may not reach finality by the time the books are required to be closed. Thus, practically the PAN number and amount payable to the creditor is subject to the certain constraints. Therefore deducting tax and paying the same to the government is proving to be challenge.

2.3 The plain reading of the sections requires taxes to be deducted and paid to the government, at the time of making the credit to the account of the payee or any other account (by whatever name called). However, how the credit for such taxes will move to the correct assessee and of the correct amount remains a challenge. Therefore assessee refrain from deducting tax on such year end provisions, but deduct the same at the time of actual payment of the amount, after determining the party and the amount finalised, i.e. WHEN THE LIABILITY TO PAY HAS CRYSTALLISED.

2.4 Various decisions have held either way, and **finality will be achieved only when the Supreme Court decides the matter either way.**

The latest decision of the Karnataka High Court is in favour of the assessee :

- a. Toyota Kirloskar Motor (P) Ltd [TS-249-HC-2021(Kar)]
- b. Tata Sky Ltd. MA reversing the decision of (c) below
- c. Tata Sky Ltd. 119 taxmann.com422(Mum) – AGAINST
- d. Tata Sky Ltd 99 taxmann.com 272 (Mum)
- e. Sanghi Infrastructure Ltd 96 taxmann.com 370 (Guj)
- f. Mahindra & Mahindra Ltd 117 Taxmann,com 518 (Mum) – pending bills, - Liability not crystallised

2.5 **New section for Tax Collection at Source introduced from 1.10.2020 :**

Section 206C(1H)

- If the Sales turnover is more than 10 crores in the previous financial year i.e. the year ended 31 March 2020, then this year,
- the seller will have to collect and deposit TCS on the sales receipts from sale of goods
- from such buyers from whom seller received more than Rs. 50 Lakhs as sale consideration during the current Financial year.
- The TCS is payable on the amount of receipt which is greater than 50 Lakhs and received after 1st. Oct. 2020. The rate of TCS is 0.1%
- due to corona Pandemic 25% discount had been given in this tax rate till 31 March 2021 and its effective rate is 0.075%.

By the time the assessee settled their systems with the new provisions of Section 206C(1H), **new section introduced with effect from 1.7.2021 viz. Section 194Q:**

As per provisions of **section 194Q of the Income Tax Act**, TDS is deductible if-

- The buyer is responsible for making payment of a sum to the resident seller; and
- Such payment is to be done for the purchase of goods of the value/ aggregate of the value exceeding INR 50 Lakhs.
- the term 'buyer' means as under-
- A person having total sales/ gross receipts/ turnover exceeding INR 10 Crores in the immediately preceding Financial Year in which the specified purchase of goods took place;
- Buyer will not include any person notified by the Central Government.

- **TDS on purchase of goods is to be deducted by the buyer within earlier of the following dates-**
- **At the time of credit of the sum into the account of the seller** or any other account under the books of accounts of the person liable to make payment of such income. ; or
- **At the time of payment of the sum thereof.**
- The buyer is liable to deduct TDS at the rate of 0.1% of the purchase value above INR 50 Lakhs; in absence of PAN rate of 5%
- Effective from 1st July 2021.
- **section 194Q are not applicable under the following cases-**
 - o TDS is already deductible under other provisions of the Income Tax Act; or
 - o Transactions on which TCS is collectable as per provisions of section 206C [other than a transaction on which TCS is collectable under section 206C(1H)].
- Transactions, wherein, TDS is deductible under both the provisions i.e., section 206C(1H) and **section 194Q**. Under such cases, TDS would be deductible only under **section 194Q**.
- not applicable when the seller is a non-resident.
- Failure to comply with the tax deduction entails disallowance u/s 40a(ia), there would be disallowance of expenditure up to 30% of the value of the transaction.
- apply to the purchase of both the types of goods i.e. capital as well as revenue.

The rate of tax for both the above section is so low that the cost of compliance is going to be much more than the taxes involved, which has to be borne by the assesseees.

The GST portal and reporting practically have covered most of the transactions that are sought to be covered and reported by the new sections of TCS and TDS are unnecessary duplication on which all assesseees have to be compliance officers and data entry officers for the Exchequer.

Any issues of Non compliance and litigation thereof will be Non Productive and the Revenue may end up realising that the cost of administering these sections is more than the revenue collected. Like Wealth Tax and Estate Duty, these sections may end up being abruptly deleted.

2.6 Circular no.720, dated 30-8-1995

“It has been brought to the notice of the Board that in some cases persons responsible for deducting tax at source are deducting such tax by applying more than one provision for the same payment. In particular, it has been pointed out that the sums paid for carrying out work of advertising are being subjected to deduction of tax at source under section 194C as payment for work contract as also under section 194J as payments of fees for professional services.

2. It is hereby clarified that each section, regarding TDS under Chapter XVII, deals with a particular kind of payment to the exclusion of all other sections is this Chapter. Thus, payment of any sum shall be liable for deduction of tax only under one section. Therefore, a payment is liable for tax deduction only under one section.”

In spite of the number of sections increasing year after year, this circular still holds good and the CBDT has not withdrawn the same and taxpayers should rely on this with the spirit with which it is on the statute book.

3. “ASSEESSEE IN DEFAULT”

3.1 The Hon. Supreme Court, in the case of Hindustan Coca Cola Beverage (P.) Ltd.[2007] 293 ITR 226 (SC) held as under:

“Section 201 of the Income-tax Act, 1961 - Deduction of tax at source - Consequence of failure to deduct or pay - Whether where deductee, recipient of income, has already paid taxes on amount received from deductor, department once again cannot recover tax from deductor on same income by treating deductor to be assessee-in-default for shortfall in its amount of tax deducted at source - Held, yes”

In the judgment reference was made to Circular No. 275/201/95-IT(B), dated 29-1-1997 where the Board has given instruction to the effect:

The Board is of the view that no demand visualised under section 201(1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer in charge of TDS that taxes have been paid by the deductee-assessee.

3.2 No procedure or machinery was however put in place since 2007 till Finance Act 2012, when a proviso was inserted in Section 201, with effect from 1-7-2012 :

“[Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a payee or on the sum credited to the account of a payee shall not be deemed to be an assessee in default in respect of such tax if such payee—

- (i) has furnished his return of income under section 139;*
- (ii) has taken into account such sum for computing income in such return of income; and*
- (iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed]”*

3.3 The prescribed form is Form 26A is the standardised form in which the three aspect mentioned above are incorporated and when prepared and filed on the Traces site, the tax in question is not required to be paid again and only the interest element is paid and the challan details are fed into the Site.

3.4 The demand raised by the Assessing Officer for the interest u/s 201 should be responded with a copy of the form 26A filed to ensure that the Demand is nullified on the portal of the income Tax site.

4. CERTIFICATES OF NON DEDUCTION / LOWER DEDUCTION OF TAX – U/S 197/195(2)/195(3)

4.1 These certificates are now compulsorily to be obtain electronically only. The applications are to be done online only and the certificates obtained are also only through the electronic media – IT SHOULD BEAR THE **ALPHANUMERIC CODE**, which has to be mentioned in the Statement of TDS to be filed quarterly.

4.2 For Individuals, NIL deduction are not being issued at all. Thus having successfully obtained a certificate of NIL deduction from particularly the International Tax Division should not be considered as a Success – it has to be authenticated from the Tax portal with the Alphanumeric Code.

4.3 Another important aspect with creates Short Deduction demands which call for attention and care are the certificates issued u/s section 195(2)/195(3) . These certificates only mention the rate of tax at which the tax is required to be deducted, and do not mention the surcharge and cess applicable on payments to Non Residents. Various assessees rely on the bare rate mentioned and deduct tax without the surcharge and cess applicable, and the demands are finally payable and not rectifiable or appealable.

5. REPORTING OF DETAILS IN QUARTERLY STATEMENTS AND TAX AUDIT REPORT.

5.1 Reporting of transactions attracting the various provisions which attract TDS has to be done quarterly vide Forms 24Q (Salaries), 26Q (payments under various sections to Resident payees) and 27Q (Payments to Non Resident payees). Each of these forms consists of three parts:

- a. Details of Deductor
- b. Details of Payment of TAX (Challans details)
- c. Details of Deductees

5.2 Though most of the sections specify the rates at which tax is required to be deducted, there are various reasons due to which, tax is either not deducted or deducted at lower rates or higher rates. These are required to be mentioned in the forms of specified codes as mentioned in the respective forms, while filling up the details of the Deductees to whom such rates are applied.

Form 24Q Column no 328 – three codes have been specified for mentioning:

- a. Deduction as per certificate u/s 197(lower deduction) issued by the department
- b. Deduction as per certificate u/s 197(NIL deduction) issued by the department
- c. Deduction at higher rate for not providing PAN number to the deductor.

Form 26Q Column no has similarly 11 categories of deductees who may qualify for deduction at a rate different from the rates specified under different sections, ranging from below exemption limit, submission of for 15G/H, section 197 certificates, 206AA applicability, etc.

Form 27Q Column No 729 – seven codes have been specified which need to be specified.

Many assesseees tend to fill the details of deductees, only where TAX is deducted and do

not give the details where tax was not required to be deducted.

Why these are important is for the cross tally of the nature of payment and with the appropriate deductions made, as reflected in the Tax Audit Report at Clause 34a, b and c.

5.3 It has been observed that the Statements of TDS / TCS are filed with CPC Traces, Ghaziabad and the returns of Income, where Tax Audit report u/s 44AB, is uploaded is filed with CPC E-Filing Bangaluru. The Tax audit report gives the yearly summary of the section wise TDS / TCS attracted and effected, therefore when the processing of returns is done, if the details filed do not correctly match with the quarterly returns, there may arise uncalled for adjustments or additions to the total income, which can be avoided if the Statements are correctly filed.

5.4 Many Tax Auditors also do not carry out this exercise and fill up the details in the tax audit audit or restrict the exercise to the details filed in the Statement of TDS filed; When these are matched with the Profit and Loss figures, mis matches appear and invite adjustments or additions.

6. ACCURACY OF SYSTEMS, FILING STATEMENTS AND RETURNS NEED TO BE ENSURED

6.1 The above requires updation of computer systems, training of staff and “near perfection” accuracy of Data collection, recording, reporting and maintenance.

These Compliances entails costs for the assesseees at large. The cost of non compliance or inaccuracies is large and therefore not affordable.

6.2 Department needs to realise that such costs need to be matched with corresponding revenue for which a system of rebate or commission needs to be put in place so that the hardship faced by the Tax deductor/collector is minimised and compliance is cost effective.

